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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 5.

CHESTER C. DODGE, CATHERINE L. BAIRD, AZILE B. REYNOLDS, ET AL., *Appellants*,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., *Appellees*.

REPLY BRIEF FOR APPELLANTS ON REARGUMENT.

Upon reargument of this case appellants adopt the brief and reply brief heretofore filed by them. The brief here presented is intended as a short restatement and discussion of the principles involved and as an answer to certain arguments now advanced by the appellees.

1. The Question for Decision is Whether Appellants Are Protected by Contracts With a State.

The point at issue remains a narrow one. It is whether or not these appellants acquired vested rights under an Illinois statute of 1926 and 1927, known as the Miller Act, that

could not constitutionally be destroyed by later legislation. The Miller Act appears in full on pages 62 to 65 of Appellants' original brief and on pages 87 to 90 of Appellees' brief on reargument.

If these vested rights were acquired under the Miller Act, they arose by reason of an offer on the part of the State and acceptance by the appellants, thereby creating contracts entitled to protection under Section 10 of Article I of the Federal Constitution and of the Fourteenth Amendment thereto. The jurisdictional question is one with the merits. If there are existing contracts that have been infringed, this Court has power to consider and decide the case and set aside the unlawful act of the State legislature which impaired them. If the rights of appellants have not vested, they are not within the area protected by the Constitution and this Court may properly dismiss the appeal. There are no collateral questions relating to jurisdiction since, as shown by our original jurisdictional statement and brief, all facts have been properly raised and presented, here and below.

The Miller Act, according to its title, provided for the compulsory retirement of teachers, principals, district superintendents and assistant superintendents and the payment to them of retirement annuities. Under Section 1 of the Act retirement was to begin at age 75 and to continue at a progressively earlier age until, after five years, all retirements were to be at age 70. Section 2 provided that:

> "Each person so retired from active service who served in the public schools of such City for 20 or more years prior to such retirement shall be paid the sum of Fifteen Hundred Dollars ($1500) *annually and for life* from the date of such retirement from the money derived from the general tax levy for educational purposes: * * *" (Italics ours.)

The Act was amended in 1927 to provide in its title for both compulsory and voluntary retirement of teachers, principals, district superintendents and assistant superin-

tendents and for the payment of retirement annuities. Section 3 was added at that time authorizing voluntary retirement from 65 to 70 years of age at "annuities for life" of from One Thousand Dollars to Fifteen Hundred Dollars per year.

The appellants here are members of the classes described in Sections 1, 2 and 3 of the Miller Act. The great majority (651) retired voluntarily pursuant to the Act at ages ranging from 65 to 70. Of the remainder, 132 sought to retire voluntarily under the Act and the consent of the Board of Education of Chicago was withheld, although that consent is admitted to have been purely ministerial. (R. 256.) The same admission was made by counsel for appellees during the course of the first argument before this Court. 162 appellants of the age of 70 or over were retired under the compulsory provisions of the Act at Fifteen Hundred Dollars a year for life.

The Miller Act was adopted by the Illinois Legislature upon the recommendation and at the insistence of the Chicago Board of Education and its superintendent of schools, for reasons which they deemed adequate and impelling. (R. 51-53.) The 1927 amendment to the Miller Act providing for voluntary retirement was also recommended to the Legislature by the Superintendent of Schools and Board of Education of the City of Chicago and the Superintendent's report states that "The amendment will give the schools relief from incapacitated teachers over 60 years of age without additional cost, as new teachers taking the place of those retiring will begin at lower steps of salary schedule. Therefore, salary of new teachers and pension under amendment would be less than salary of old teacher retiring under amendment." (R. 65.)

By act of July 12, 1935, the Illinois Legislature abolished voluntary retirement of teachers, lowered the compulsory retirement age to 65 and provided that "each person so retired from service shall be paid the sum of Five Hundred Dollars ($500.00) annually and for life from the date of such

retirement from the money derived from the general tax levy for educational purposes." * * * (R. 73.)

The Supreme Court of Illinois in its opinion in this case, applied the 1935 Act retroactively to curtail the retirement annuities of appellants to Five Hundred Dollars annually. By its decision, which upheld the action of the Board of Education, appellants lost from one-half to two-thirds of the annual annuities to which they were entitled under the Miller Act. This, we submit, was a clear impairment of appellants' rights and if these rights were vested by reason of contracts with the State, no further proof of violation of the Federal Constitution is necessary. The question thus becomes one of application of the principles of contract law to the relationship entered into between appellants and the State of Illinois, with due regard for the rights of both individuals and sovereign.

Appellants have never contended that the passage of the Miller Act, in and of itself, entitled them to claim any vested rights. Such rights arose at the time of retirement and acceptance of the annuities which the Act offered. Upon retirement each appellant, having served the required period, had fully performed his or her part of the contract in accordance with the terms of the offer, and nothing then remained that he or she could do. It is the State which has failed of performance and which has attempted to retain a substantial amount theretofore earned by each of appellants in violation of its contract and of the Federal Constitution. *Robertson* v. *Miller*, 276 U. S. 174.

2. Brief Discussion of Additional Points Raised by the Appellees.

The principal argument heretofore advanced by appellees in this Court and in the courts below has been that no contract was offered to the teachers and that there could, therefore, be no acceptance. The reason given was that, in law, the offer of a pension was the offer of a gratuity which could be withdrawn at the will of the sovereign. This point

has been thoroughly discussed in the briefs for both sides and we refer to our original brief and reply brief for arguments sustaining our position that contracts were created based upon adequate consideration. Additional cases which recognize the vesting of contract rights although no contributions compulsory or otherwise were made by the employees are:

Matter of Wright v. *Craig*, 202 App. Div. 684, 195 N. Y. S. 391, affirmed without opinion 234 N. Y. 548.
Tilbert v. *Eagle Lock Co.*, 116 Conn. 357.

The appellees now suggest that if the Miller Act did in fact offer contracts to the appellants which were accepted by them, such contracts must be held to be something less than binding upon the State for a number of reasons, chief of which are that the law in Illinois at the time of the passage of the Miller Act must be read into the contracts, and that when so read, the contracts cannot be construed to be binding (Appellees brief on reargument, point IV, pages 68-77); and that either the reserved powers or the police powers which the State was entitled to exercise, gave it the right to amend the contract at will, even though such action was highly detrimental to appellants. (Appellees brief on reargument, point V, pages 78-82.)

(a) Reply to Appellees' Position that Illinois Decisions Declaring Pensions to be Gratuities Should Be Read Into the Contracts Between Appellants and the State.

Appellees devote one main heading of their argument to the proposition, first, that pensions in Illinois were always deemed by the courts of that State to be gratuities or bounties, terminable at will and, second, that the legislature must have known the state of the law and included it by implication in the Miller Act.

The inclusion must be by implication since it is certainly not expressed. There are no words of reservation in the Miller Act and the "annuities" there provided are to be

paid "for life". It seems to us that the argument falls for two reasons and that the plain words of the Act must stand.

The Miller Act, contrary to most of the Illinois Acts that preceded, it, did not use the word "pension". It used the word "annuity". The Legislature chose to adopt a terminology based on contract rather than on gift and one which implied a consideration received as well as offered.

Prior to 1919 Illinois laws concerning retirement allowances to public employees were denominated pension laws and the allowance made was always referred to in the Act as a pension, except in certain laws relating to teachers. In 1919 the Legislature adopted an Act entitled "An Act to Provide for * * * a Park Employees, Annuity and Benefit Fund" (Ill. Sess. Laws 1919, p. 785). At the next session of the Illinois Legislature in 1921 three entirely new laws were passed providing for retirement allowances to public employees which referred to such allowances in the title and body of the Acts as "annuities". One related to "a Municipal Employees' Annuity and Benefit Fund" (Ill. Sess. Laws 1921, p. 205); another to "a Policemen's Annuity and Benefit Fund" (Ill. Sess. Laws 1921, p. 262), and the third to "a Park Employees' Annuity and Benefit Fund" (Ill. Sess. Laws 1921, p. 592.)

No new Acts providing for retirement allowances were passed by the 1923 session of the Illinois Legislature. In the 1925 Session two new Annuity Acts were passed, one, the original Miller Act, which did not become effective until it was approved by the Governor May 19, 1926, and the other, a "County Employees' Annuity and Benefit Fund" Act (Ill. Sess. Laws 1925, p. 266).

The Supreme Court of Illinois had not passed upon any statute involving "annuities" of this type at the time of the adoption of the original Miller Act. It may be inferred that the Legislature deliberately sought to create a new kind of retirement allowance, distinguished from the old by being an annuity rather than a pension.

The other fallacy in the argument of appellees is that the law of Illinois upon this subject is clear. As we have heretofore pointed out and need not here repeat in detail, the law of Illinois has for years been in confusion upon the question of the legal effect of a statute creating pensions. Under these circumstances the legislature, if it sought to include court decisions upon the subject by implication, merely tended to foster the confusion already existing. Such a motive should not be imputed to it where the words of the Miller Act are clear and unambiguous and reach an equitable result in accordance with a plain meaning.

The early cases had reason to consider the pensions of that day as mere gratuities. A typical example is the case of *Walton* v. *Cotton,* 19 How. 355. There an Act of Congress of 1832 created certain pensions for Revolutionary soldiers and their descendants. Such a grant, made long after all services had been performed, could be nothing but a gift which might be revoked at will.

However, as now used, the word pension more commonly embraces a newer concept of an offer held out in advance of retirement, of an additional sum to be paid when the employee's term of regular service has been faithfully completed. *Roddy* v. *Valentine,* 268 N. Y. 228, 231. It is an inducement for the performance of future services in the shape of compensation withheld and it benefits employer and employee alike by assuring a continuity of employment, retirement at an age deemed by the employer to be most advantageous to him, and security thereafter for the employee during his last years. A pension offered under such circumstances is received not as a gift upon retirement but as a right which has been earned.

Adequate social planning today requires that those who have given the productive portion of their lives to a task—whether governmental or private—should not be discarded without adequate provision for their future welfare. So viewed, the Miller Act with its annuities beginning at 65 or

70 after 20 or 25 years of teaching is substantially in line with modern thought. Public policy which includes the promotion of the general welfare requires that its purpose be not allowed to fail if a way can be found to preserve it.

It is easy to understand how the Illinois courts may have followed the theory that a pension is a bounty, springing from the graciousness and appreciation of the sovereign, without distinguishing between the type of pension which is a gratuity granted solely for past services after retirement and the type of pension which necessarily creates a contract because it includes an adequate legal consideration. The first statement on this subject appearing in an Illinois opinion was dictum. (*Eddy* v. *Morgan*, 216 Ill. 437, 439) and was so characterized by Dillon in his work on Municipal Corporations, 5 Ed., Vol. I, Sec. 431, p. 756, Note 1. It is more difficult to understand how the Supreme Court of Illinois could, side by side with these gratuity cases, decide others like *People* v. *Abbott*, 274 Ill. 380, *Porter* v. *Loehr*, 332 Ill. 353 and *DeWolf* v. *Bowley*, 355 Ill. 530, which plainly hold that the rights of the employee vest at the time of retirement. Once vested, a contract is created which cannot be destroyed, wholly or in part, by subsquent legislation.

Within two years after the passage of the original Miller Act and within one year after the passage of the 1927 amendment providing for voluntary retirement there was a collision in the Supreme Court of Illinois between these two theories—the one that pensions are mere bounties or gratuities and the other, that the acceptance of pensions after the periods of service and retirement create vested contract rights.

This conflict and the manner in which it was resolved by the Supreme Court of Illinois in the case of *Porter* v. *Loehr*, *supra* (decided in October 1928; rehearing denied in December 1928) clearly appears from the opinion of that Court which adopted the theory of *People* v. *Abbott*, *supra*, and from the petition for rehearing in *Porter* v. *Loehr* which was denied and which relied almost entirely on the gratuity

theory as shown by a certified copy of that petition and nine printed copies which have been lodged with the Clerk of this Court.

In *Porter* v. *Loehr, supra,* a taxpaper sought to enjoin a policemen's pension board from increasing the pensions of policemen previously retired under an amendment to the Pension Act which did not become effective until after their retirement. The amendment by express language provided that the increases were to apply to all policemen previously retired. The lower court dismissed the bill and the Supreme Court of Illinois reversed the case directing the lower court to enter a decree holding that the additional payments to policemen previously retired was unconstitutional on the ground that such payments were "a gift or gratuity".

A petition for rehearing was then filed which the Supreme Court of Illinois denied, abiding by its original decision based on the case of *People* v. *Abbott, supra,* and the theory there set forth, that a pension is in the nature of deferred compensation and that rights under a pension act vest upon retirement but that any increase in pension after retirement could not be supported by consideration and was, therefore, a gratuity and bad under the State Constitution. Section 19, Article IV of the Illinois Constitution provides:

> "The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, * * *".

The appellees in *Porter* v. *Loehr, supra,* contended in their petition for a rehearing that a pension was a gratuity or bounty and that therefore the Legislature could, as it saw fit, either increase or decrease pensions after termination of services and retirement. They asserted:

> "A pension must be either a 'bounty', or 'compensation' arising out of contract. It cannot be both." (Point VIII—Petition for Rehearing.)
>
> "* * * In Illinois a pension is held to be not 'compensation and *ipso facto* an increase of pension can-

not be 'extra compensation'. Pensions are a bounty springing from the graciousness of Government. They are not rooted in contract nor bestowed as 'compensation' or 'allowance' ". (Point IX—Petition for Rehearing.)

In support of these propositions they cited the same seven cases commencing with *Eddy* v. *Morgan,* 216 Ill. 437 and ending with *People* v. *Hansen,* 330 Ill. 79, which are cited at pages 69 and 70 of appellees' brief on reargument in this case to prove the claim there made that the Illinois Supreme Court had always followed the gratuity theory of pensions.

We respectfully submit that the conflict between these two parallel lines of decision was brought to the attention of the Supreme Court of Illinois in *Porter* v. *Loehr* and the facts just recited show that the law on the subject in Illinois was not as stated by appellees in their brief on reargument (page 70) "clear, unequivocal and long established". On the contrary, the gratuity theory as to pensions was repudiated in that case.

(b) No Power is Vested in the State of Illinois, by Virtue of Its Sovereignty to Impair Its Contracts With These Teachers.

Point V of the brief for appellees on reargument stresses the proposition that somehow the State of Illinois possesses power to abrogate contracts offered and accepted for the payment of Fifteen Hundred Dollars a year for life and to create in their stead new contracts of Five Hundred Dollars a year for life. It is suggested that this power is a sovereign power, a police power, or a reserved power, but, we submit that potent as these powers undoubtedly are, none of them can justify the action now sought to be taken.

If it be admitted for the sake of argument that the State has the power and is charged with the duty of providing for the education of its citizens and that this power is sovereign and perhaps a part of the police power, there is still no

excuse for the argument that the State is thereby absolved from responsibility for the observance of its contractual obligations. To hold otherwise, would be to say that the State may disregard every contract from which it derives a benefit as soon as the other party to the contract has performed his or her share of it. The illustration which leaps immediately to the mind is the one where a State would be entitled to repudiate its bonds, purchased by its citizens with their funds, just because the money derived from the sale of the bonds has been expended for a traditional and governmental purpose, let us say, to pay the salaries of State legislators or to build a State university. The proposition contended for is so broad that the contract clause of the Constitution could never be applied in any case where the State is one of the parties to the contract. The Constitution does not permit a State to thus play fast and loose with its citizens. *Woodruff* v. *Trapnell,* 10 How. 190; *New Jersey* v. *Yard,* 95 U. S. 104.

To permit such repudiation of contracts would lead back to the chaos that obtained before the adoption of the contract clause in the Constitution. That situation was pointed out in this Court's opinion in the case of *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, p. 427:

> "The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations."

It is true that a State legislature cannot bargain away the public health or the public morals and that there is reserved to it a very real power to interfere with existing contract rights for the protection of the public safety. *Stone* v. *Mississippi,* 101 U. S. 814; *Beer Company* v. *Massachusetts,* 97 U. S. 25; *Chicago, Burlington & Quincy R. R. Co.* v. *Nebraska,* 170 U. S. 57; *Sproles* v. *Binford,* 286 U. S. 374. But when the State assumes to contract in a manner having no

harmful effect upon the public health, public morals, public safety or any other public interest which the State is charged to protect, there is no reservation implied in law which will permit destruction, rescision or essential modification of that contract at the will of only one of the parties to it.

Counsel for appellees cite and rely upon the case of *Home Building & Loan Association* v. *Blaisdell, supra,* in support of their claim of right to modify a contract. (Brief on Reargument, pp. 79, 80.) But that case is very careful to point out the limits beyond which a state cannot go. It stands for the proposition that in an emergency, reserved powers of the State may be exercised to modify the remedy afforded by a contract so long as there is no more than a temporary interference, as it were procedural, with the substantial rights secured by the contract. This Court points out, page 439:

> "Undoubtedly, whatever is reserved of State power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

The interference with a contract which was permitted in the *Blaisdell* case was within reasonable bounds which have been far exceeded here. The attack on the contracts here under consideration by the Illinois Legislature is one which destroys the greater part of its very substance without

bothering with mere remedial forms. If that case is authority in the present controversy, it must be ranged on the side of appellants as a landmark which limits the extent to which a state may tamper with an existing contract.

Finally, the appellees insist that the Act of 1935 drastically reducing the annuities provided under the Miller Act, was justified as an emergency measure in a time of financial depression. The 1935 Act does not purport to be an emergency measure but one of perpetual duration. The record contains nothing in support of this assertion that is properly before the Court. There are allegations in the answer of the Chicago Board of Education on this subject, beginning at R. 115, which were never supported by any proof. If common knowledge and experience are called in support of this proposition it is apparent that common knowledge tells us that by July, 1935, the so-called depression had passed.

The Act of 1935 was undoubtedly a money saving measure since it took away the major part of the annuities which had theretofore been paid to the elderly retired teachers. This it purported to do not for a time but for all time and we maintain that the legislature lacked the power which it was attempting to exercise. "To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy but an act of repudiation". *Lynch* v. *United States*, 292 U. S. 571, 580. The whole quotation upon this subject from the Lynch case is very apt. It applies particularly to contracts entered into by the United States but is of equal application to contracts with a State. The opinion states as follows, pages 579, 580:

> "The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an "Act to maintain the credit of

the United States.'' Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' *Sinking-Fund Cases,* 99 U. S. 700, 719.''

If the reasons stated by the appellees are sufficient to bring the Miller Act within the police or other reserved sovereign powers of the State, any legislation by which a saving of taxes is made, regardless of whose contract it violates, can be justified as in aid of the public welfare. The argument defeats itself by pointing directly to an absurd abuse of power.

CONCLUSION.

We ask this Court to hold that appellants secured and retained vested contract rights in their annuities and that the Act of the Illinois Legislature of July 12, 1935, is unconstitutional and void as applied to these appellants for the reason that it substantially impairs these rights. It follows

that the judgment of the Court below should be reversed and the cause remanded.

Respectfully submitted,

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